Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

LNC INVESTMENTS, INC. and
CHARTER NATIONAL LIFE INSURANCE COMPANY,

Petitioners,

v.

NATIONAL WESTMINSTER BANK, N.J.,
FIRST FIDELITY BANK, N.A. NEW JERSEY
and UNITED JERSEY BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the Supreme Court should exercise its discretion to review a decision of the United States Court of Appeals for the Second Circuit when the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings so as to deny Petitioners due process. The Court of Appeals, in a 1999 opinion in this case, held that it was appropriate for the district court, on remand, to decide the central legal issue in this case and instruct the jury to follow that decision in determining the primary fact issue in this case, *i.e.*,whether the Respondents acted prudently. The district court, on remand, acting in accordance with the 1999 opinion, decided the central legal issue in the case and instructed the jury to follow that decision in determining the primary fact issue, *i.e.*, prudence. On appeal from the district court's decision of that central legal issue, and from a judgment entered pursuant to a jury verdict based on the jury's consideration of the district court's decision of that central legal issue in determining the prudence issue (the only issue the jury decided), the Court of Appeals, contrary to what it held in 1999, now held that the central legal issue was not relevant to whether Respondents acted prudently. Nevertheless, the Court of Appeals refused to vacate the judgment which was based on what the Court of Appeals now says is an improper jury instruction with respect to the only fact issue decided by the jury. The Court of Appeals also refused to review whether the central legal issue that the district court decided, and charged to the jury, was decided correctly.

STATEMENT PURSUANT TO RULE 29.6

Petitioner LNC Investments, Inc. is wholly owned by Leucadia National Corporation which is publicly traded.

Petitioner Charter National Life Insurance Company is wholly owned by The Allstate Corporation which is also publicly traded.

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LNC Investments, Inc. and Charter National Life Insurance Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case or, in the alternative, for summary reversal.

OPINIONS BELOW

The decision of the Court of Appeals from which review is sought (Appendix ("App.") 1a-23a) is reported at 308 F.3d 169 (2d Cir. 2002). The relevant earlier decision of the Court of Appeals in this case (App. 63a-93a) is reported at 173 F.3d 454 (2d Cir. 1999). The decision of the district court which was the subject of the second appeal (App. 34a-62a) is published at 247 B.R. 38 (S.D.N.Y. 2000). The earlier contrary decisions of the district court (App. 94a-104a) are unpublished. The decision of the district court certifying for interlocutory appeal the issue that later was the subject of the second appeal (App. 24a-33a) is published at 2000 WL 461612 (S.D.N.Y. April 18, 2000). The Court of Appeals order denying interlocutory appeal from the district court decision which is the subject of the second appeal, and the Court of Appeals order denying rehearing and rehearing *en banc* (App. 105a-106a), are not otherwise published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on October 17, 2002, and denied rehearing and rehearing *en banc* on December 11, 2002. (App. 105a). Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition for certiorari involves the provisions of the Trust Indenture Act, 15 U.S.C. § 77ooo(c), and the provisions of Sections 362(d)(1), 363(e), 507(b) and 361 of the United States Bankruptcy Code. The provisions of each of those statutes are reprinted in the Appendix. (App. 107a-111a).

STATEMENT OF THE CASE

This case arises out of the bankruptcy of Eastern Air Lines ("Eastern"). Petitioners own bonds issued by an equipment trust ("Trust") that, on November 15, 1986, had entered into a sale/leaseback transaction with Eastern involving one hundred ten used airplanes. Respondents are trustees of the Trust. Eastern was obligated under the terms of the trust indenture (the "Indenture") to make lease payments sufficient to cover the principal and interest payments on the bonds as they became due. The sale/leaseback was a financing transaction with the airplanes securing, and being the collateral for, the repayment of the bonds. (App. 3a).

On March 9, 1989, Eastern voluntarily filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. Eastern's bankruptcy filing constituted a default under the terms of the Indenture. As a result Respondents, under both the Indenture and the Trust Indenture Act ("TIA"), 15 U.S.C. § 77ooo(c), were required to act in accordance with the prudent person standard, *i.e.*, Respondents were required to act as a prudent person would in the conduct of his or her own affairs. (App. 3a-4a).

As secured creditors of Eastern, Respondents could have made a motion pursuant to § 362(d)(1) of the Bankruptcy Code ("Code") to lift the automatic stay that prevented the Trust from reclaiming the airplanes or, alternatively, pursuant to § 363(e) of the Code for adequate protection of the Trust's interest in its collateral ("lift stay/adequate protection motion"). 11 U.S.C.A. § 362(d)(1) (West 1993 & Supp. 2001); 11 U.S.C.A. § 363(e) (West 1993 & Supp. 2001). At the beginning of the Eastern bankruptcy the value of the airplanes significantly exceeded the amounts due to the bondholders. (App. 4a). Petitioners asserted that, therefore, if Respondents had made a lift stay/adequate protection motion at the beginning of the Eastern bankruptcy, Respondents either: (i) would have recovered and been able to sell the airplanes for enough to pay the bondholders in full; or (ii) would have received a superpriority claim, which because the Eastern bankruptcy estate was administratively solvent also would have resulted in the bondholders being paid in full. (App. 65a, 70a-71a).[1]

After Eastern filed for bankruptcy, Respondents permitted Eastern to continue to use the Trust's airplanes. Respondents waited twenty months after Eastern filed for bankruptcy before making a lift stay/adequate protection motion. During that twenty month period, the value of the

1. One of the Respondents was a secured creditor of Eastern in its individual, and not just in its trustee, capacity. Within two weeks of the Eastern bankruptcy filing that Respondent, in its individual capacity, took the very steps on its own behalf that Petitioners claim should have been taken by that Respondent and the other Respondents in their trustee capacity and, as a result, that Respondent in its individual capacity was paid in full, unlike the bondholders who lost hundreds of millions of dollars. (JA 1279-80, JA 406-07, JA 410.1-.28). Senior Judge Haight excluded such evidence at trial. References to "JA __" are to pages in the Joint Appendix which was filed in the Second Circuit Court of Appeals.

airplanes eroded significantly leaving the Trust and the bondholders with insufficient collateral and hundreds of millions of dollars in losses. (App. 4a, 68a-69a).

A. *The central legal issue*

Petitioners commenced this action in October 1992, alleging, *inter alia*, that Respondents had failed to act prudently by waiting twenty months to make a lift stay/adequate protection motion. (App. 4a-6a, 70a-71a). Petitioners asserted that, when a secured creditor makes a lift stay/adequate protection motion, the bankruptcy court may only authorize the debtor to continue using the secured creditor's collateral if the bankruptcy court finds that the debtor is providing the secured creditor with adequate protection. (App. 70a).

The bankruptcy court can find that the debtor is providing the secured creditor with adequate protection either: (i) by finding that something already exists that provides adequate protection, such as an equity cushion, (*i.e.*, the value of the collateral exceeding the amount of the secured creditor's claim); or (ii) by finding that some additional protection being offered by the debtor, such as payments, additional collateral, insurance, maintenance of the collateral, etc., constitutes adequate protection. Petitioners assert, in the event of either ruling (*i.e.*, either denying the motion based on a finding that adequate protection already exists or granting the motion based on the adequacy of additional protection proposed by the debtor), the Trust would be entitled under § 507(b) of the Code to a superpriority administrative claim to compensate it for any decline in the value of the collateral subsequent to the making of the lift stay/adequate protection motion if it later turns out the adequate protection identified by the bankruptcy court was not adequate. (App. 70a, 6a).

Petitioners asserted that it was imprudent to wait to make a lift stay/adequate protection motion because of the danger that the value of the airplane collateral would decline. If Respondents waited, as they did, to make the lift stay/adequate protection motion until after the value of the airplanes had declined and the automatic stay was lifted, the amounts realized from the sale of the airplanes would be insufficient to pay the bondholders in full, as turned out to be the case. If Respondents waited to make the lift stay/adequate protection motion until after the value of the airplanes had declined and the stay was left in place, the value of any superpriority claim would have similarly declined because the superpriority claim is determined by the value of the collateral when the lift stay/adequate protection motion is made.

Respondents have never disputed that a bankruptcy court order granting some form of additional adequate protection on a lift stay/adequate protection motion was sufficient predicate for a superpriority claim under § 507(b). Respondents, however, have contended that, as a matter of law, a creditor is not entitled to a superpriority claim when a bankruptcy court has denied an earlier lift stay/adequate protection motion on the ground that the creditor is adequately protected by some already existing adequate protection. (App. 6a-7a).

B. *The § 507(b) rulings during and after the first trial*

There have been two trials of this case, the first before Chief Judge Michael B. Mukasey and the second before Senior Judge Charles S. Haight, Jr. In the first trial, Chief Judge Mukasey ruled that the denial of a lift stay/adequate protection motion by itself would have been a sufficient

predicate for a superpriority claim. (App. 7a). The jury in the first trial returned a special verdict finding that Respondents had been imprudent. (App. 7a).[2]

On appeal after the first trial, the Court of Appeals vacated and remanded for a new trial because the district court's instructions to the jury improperly required Petitioners to prove reliance as an element of their claims. (App. 73a-79a; App. 8a). The Court of Appeals also held that the question of whether the denial of a lift stay/adequate protection motion on the basis of already existing protection was sufficient for a superpriority claim was a legal one which the district court had to decide and then instruct to the jury. (App. 90a-93a; App. 8a). The Court of Appeals held:

> . . . As we have noted, however, while it will be entirely correct for the district court, on remand, **to have a jury, appropriately instructed as to the law on superpriority status, consider whether the [Respondents'] delay in making the Lift Stay/Adequate Protection Motion was prudent**, the jury should not be permitted to decide itself the legal question whether the bankruptcy court's denial of the Motion would have resulted in superpriority status by operation of § 507(b). Accordingly, if the district court decides that as a legal matter the denial of the Motion would have resulted in superpriority status for the [Petitioners'] claims, **it should so instruct the jury and should determine by use of jury interrogatories, *see* Fed. R. Civ. P. 49(b),**

2. The jury in the first trial, however, found that Respondents' imprudence had not caused Petitioners' injury. (App. 7a).

> **whether the [Respondents] breached their duty of prudence** by failing to make the Motion earlier and, if so, what damages are specifically attributable to that failure.

(App. 92a-93a) (emphasis added).

C. *The § 507(b) rulings and the charge to the jury in the second trial*

In the second trial, Senior Judge Haight, contrary to Chief Judge Mukasey, ruled that a secured creditor's claim is not given superpriority status if the bankruptcy court denies a lift stay/adequate protection motion, and the secured creditor's collateral subsequently proves inadequate to cover its claim. (App. 34a-62a; App. 8a).[3] Senior Judge Haight, in accordance with the Court of Appeals 1999 opinion, charged the jury to consider his § 507(b) ruling in determining whether Respondents had acted prudently. (JA 1262-65)[4] The jury in

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3. Senior Judge Haight certified the issue for interlocutory appeal by order dated April 18, 2000. (App. 26a-33a). The Court of Appeals, by order and mandate dated May 30, 2000, declined to hear the issue on an interlocutory appeal.

4. Senior Judge Haight's charge states:

> **[T]he factual issues that you will decide require some understanding of a few basic principles of bankruptcy law.** As I go over these principles, I want you to bear in mind two things.
>
> First, these principles are intended only to provide a framework to help you organize the factual disputes in

(Cont'd)

the second trial returned a special verdict finding that Respondents had not been imprudent. (App. 11a).

The contradictory verdicts of the first and second juries reflect that the meaning of § 507(b) is the deciding factor for a jury as to whether Respondents acted imprudently.

D. *The Second Circuit declines to decide the merits of Petitioners' appeal*

On appeal, Petitioners asserted that Senior Judge Haight had erroneously decided, and accordingly instructed the jury, that a § 507(b) superpriority claim would not arise if the bankruptcy court denies a lift stay/adequate protection motion. The Panel majority in the Court of Appeals declined to review and resolve that legal issue because, according to the Panel majority, the meaning of § 507(b) "is irrelevant to the issue of prudence," which was the only fact issue decided by the jury at the second trial. (App. 15a-16a). The opinion completely ignored the record fact that Senior Judge Haight had charged the jury that his decision as to the meaning of § 507(b) was relevant and was to be considered by them in determining whether Respondents had acted imprudently.

(Cont'd)

> this case. Which is to say, bankruptcy law is important in this case only to the extent that it helps you determine the ultimate issues, namely, **whether each of the [Respondents] acted or failed to act in accordance with the prudent man standard that I have just described**, and, if so, whether such conduct proximately caused [Petitioners'] economic loss.

(JA 1262) (emphasis added).

The concurring opinion of the Honorable Fred I. Parker rejected the Panel majority's position, finding that the meaning of § 507(b) was relevant to the issue of whether Respondents acted prudently. (App. 18a-20a). Judge Parker stated that, because Petitioners' theory of imprudence hinged so heavily on the existence of a superpriority claim after the denial of a lift stay/adequate protection motion, an instruction that the law was to the contrary "deprived [Petitioners] of the ability to establish liability on the part of the [Respondents]." (App. 19a).[5]

Petitioners moved for reargument on October 31, 2002. Because the Court of Appeals had now decided that the meaning of § 507(b) was not relevant to the issue of prudence and, apparently, was not aware of, or ignored, the record fact that Senior Judge Haight had charged the jury that the meaning of § 507(b) was relevant to, and was to be considered by the jury in determining, whether Respondents acted imprudently, Petitioners pointed out the fact of Senior Judge Haight's charge to the Court of Appeals and requested the Court of Appeals to reconsider its decision. As a matter of simple logic, in light of the Panel majority's opinion that the meaning of § 507(b) was not relevant to the issue of prudence and that Senior Judge Haight charged the jury to the contrary and the fact that the only issue the jury at the second trial decided was prudence, the Court of Appeals either should have vacated the judgment because of the erroneous and obviously material jury charge or should have addressed whether Senior Judge Haight's decision with respect to the meaning of § 507(b) was correct. The Court of Appeals did

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5. Judge Parker concurred in the affirmance, however, because he believed that Senior Judge Haight was correct with respect to his interpretation of § 507(b). (App. 21a-23a).

neither. Instead, it summarily denied the motion without opinion by order dated December 11, 2002. (App. 105a-106a).

REASONS FOR GRANTING THE PETITION

The Court should grant the writ for certiorari, or grant summary reversal, because the Court of Appeals, in refusing to vacate the judgment on the basis that the jury was improperly charged and in refusing to decide the merits of Petitioners' appeal from Senior Judge Haight's interpretation of § 507(b) of the Code, departed from the usual and ordinary course of judicial proceedings and deprived Petitioners of due process for three reasons.

First, a Court of Appeals: (i) should not be permitted in one opinion to hold that something material, in this case the meaning of § 507(b), was relevant to — and should be charged to, and considered by, a jury in — determining the most important issue in the case, *i.e.*, whether Respondents acted imprudently; (ii) then, after a trial is conducted in accordance with that holding, hold that what the Court of Appeals said should have been charged to and considered by the jury was not relevant to the jury's determination; and (iii) without vacating the judgment based on the improper jury charge or addressing whether what was charged to the jury was accurate.

Second, a Court of Appeals should not be permitted to summarily deny a motion for rehearing, or *en banc* rehearing, when it has been put on notice of a record fact, in this case that Senior Judge Haight had charged the jury with respect to the meaning of § 507(b) and that the jury should consider § 507(b) in determining whether Respondents acted

prudently, and that record fact, in light of the Court of Appeals' opinion, would require that the judgment be vacated. At a minimum this Court should grant summary reversal of the denial of the motion for rehearing and order the Panel, or the Court of Appeals *en banc*, to rehear Petitioners' appeal.

Third, the underlying substantive issue of the interpretation of § 507(b) is an extremely important federal question that affects every bankruptcy case in which there is a secured creditor.

ARGUMENT

THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Certiorari, or summary reversal, should be granted because the Court of Appeals' refusal either to vacate a judgment based on what the Court of Appeals said was an improper jury charge concerning the sole issue decided by the jury or to decide the correctness of the central legal issue in the case, the meaning of § 507(b), constituted such a significant departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. In the alternative, this Court should summarily reverse the Court of Appeals' order denying Petitioners' motion for rehearing or *en banc* rehearing.

The Panel majority recognized that the § 507(b) question raised on Petitioners' appeal was a difficult question (App. 14a-15a n.8) and, obviously, wanted to, and did, avoid deciding the question. The accepted and usual course of judicial proceedings, however, is to the contrary.

Legal questions are to be decided absent some reasoned and principled basis to avoid the issue. The basis on which the Court of Appeals refused to decide the issue was neither reasoned nor principled. Rather, it was based on an unavailing attempt to rewrite its 1999 decision in this case (which Senior Judge Haight had followed) and on a blatant misreading, or disregard, of Senior Judge Haight's charge to the jury with respect to prudence.

A. The Court of Appeals deemed the meaning of § 507(b) to be irrelevant to the prudence issue but Senior Judge Haight had charged the jury to consider the meaning of § 507(b) in determining the issue of prudence.

The Court of Appeals declined to decide the merits of the Petitioners' appeal from Senior Judge Haight's § 507(b) ruling because the jury had returned a special verdict finding that Respondents were not imprudent and the correct interpretation of § 507(b) according to the Court of Appeals was irrelevant to that finding. Specifically, the Court of Appeals stated that "the meaning of § 507(b) was irrelevant to the issue of prudence." (App. 1a-2a, 15a-16a).

That, however, is not what the Court of Appeals said in its 1999 decision in this case. There it said the meaning of § 507(b) not only was relevant to the issue of prudence but also that the jury was to be instructed as to the meaning of § 507(b) in determining "whether the [Respondents] breached their duty of prudence." (App. 92a-93a).[6] The Court of

6. In fact, the Court of Appeals specifically invited the parties to address the district court's § 507(b) ruling in a second appeal to the Court of Appeals. (App. 93a).

Appeals' 1999 decision did not state that § 507(b) related "solely to the issue of causation, not prudence" as the Panel majority states in the 2002 decision. (App. 13a, 1a-2a). The Court of Appeals, in its 1999 decision, stated:

> As we have noted, however, while it will be entirely correct for the district court, on remand, to **have a jury, appropriately instructed as to the law on superpriority status, consider whether the [Respondents'] delay in making the Lift Stay/Adequate Protection Motion was prudent, . . .**
>
> * * *
>
> **. . . it should so instruct the jury and should determine by use of jury interrogatories, *see* Fed. R. Civ. P. 49(b), whether the [Respondents] breached their duty of prudence by failing to make the Motion earlier. . . .**

(App. 92a-93a) (emphasis added).

On remand, Senior Judge Haight, acting in accordance with the Court of Appeals' 1999 decision, specifically instructed the jury to consider his interpretation of § 507(b) in the jury's deliberations. (JA 1263-65). Prior to the section of his charge relating to the various Code sections that were at issue in the case (primarily those Code sections relating to the meaning of § 507(b)), Senior Judge Haight gave an umbrella charge instructing the jury how to use those Code sections in their deliberations stating:

> **[T]he factual issues that you will decide require some understanding of a few basic principles**

> **of bankruptcy law.** As I go over these principles, I want you to bear in mind two things.
>
> First, these principles are intended only to provide a framework to help you organize the factual disputes in this case. Which is to say, bankruptcy law is important in this case only to the extent that it helps you determine the ultimate issues, namely, **whether each of the [Respondents] acted or failed to act in accordance with the prudent man standard that I have just described**, and, if so, whether such conduct proximately caused [Petitioners'] economic loss.

(JA 1262) (emphasis added).[7]

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7. Senior Judge Haight, in certifying his § 507(b) ruling for interlocutory appeal, previously had indicated that he did not perceive the Court of Appeals' 1999 decision as precluding the jury's consideration of the effect of § 507(b) on their determination of whether Respondents acted prudently stating:

> [T]he Court of Appeals' resolution of the certified question of law construing § 507(b) of the Bankruptcy Code would "materially affect" the outcome of the litigation in the district court. **If in the Court of Appeals' view I correctly concluded that the stated circumstances would not confer superpriority status upon the [Petitioners'] claim, then their prospects on the retrial of proving (a) imprudence on the part of the [Respondents]** that is (b) causally related to the [Petitioners'] losses are **both** rendered materially more difficult.

(Cont'd)

By ignoring the fact the jury had been instructed to consider, and therefore is presumed to have considered, Senior Judge Haight's interpretation of § 507(b) in its prudence deliberations, while at the same time holding that the meaning of § 507(b) was not relevant to the issue of prudence but refusing either to vacate the judgment on the basis of the improper jury charge or to decide the correctness of Judge Haight's interpretation of § 507(b), the Court of Appeals significantly departed from the accepted and usual course of judicial proceedings. The Court of Appeals was required either to vacate the judgment because of the improper jury instruction on the issue of prudence or to decide the substantive § 507(b) issue.

Where a Court of Appeals avoids the merits of an appeal, as it did in this case, or allows lower courts to avoid deciding issues that are properly before them, then there is a departure from the accepted and usual course of judicial proceedings which warrants the exercise of this Court's supervisory authority. *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) (Court of Appeals could not invoke rule permitting dismissal of appeal where there was no sound basis to extend rule to appellant); *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336 (1976) (docket congestion was not a sound basis to forego hearing merits of case properly within district court's removal jurisdiction); *Southwestern Sugar and*

(Cont'd)

> On the other hand, if the Court of Appeals, reversing my opinion, holds that an earlier motion by the [Respondents] would have guaranteed superpriority status for the [Petitioners] even if denied, **then [Petitioners'] prospects on the imprudence element are materially improved.**

(App. 29a-30a) (emphasis added).

Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959) (Court of Appeals cannot defer deciding appellate issues in deference to pending proceedings before federal agency). *See also Thomas v. Arn*, 474 U.S. 140 (1985) (Court of Appeals can decline to hear merits of appeals where there is a reasoned basis for the exercise of such authority); *Iacurci v. Lummus Co.*, 387 U.S. 86 (1967) (Court of Appeals erred in declining to consider various bases for jury's verdict in favor of petitioner); *Wisniewski v. United States*, 353 U.S. 901 (1957) ("it is the task of a Court of Appeals to decide all properly presented cases coming before it").

This Court also has exercised its supervisory authority where a Court of Appeals has plainly ignored the record below which the Court of Appeals did in this case. *Morris v. Slappy*, 461 U.S. 1 (1983) (Court of Appeals misread the record when it decided that court's refusal of continuance violated right to assistance of counsel); *Jaffke v. Dunham*, 352 U.S. 280 (1957) (Court of Appeals improperly declined to consider affidavit addressed to issue then on appeal on ground affidavit had been ruled inadmissible when submitted in the proceedings in the district court); *Maggio v. Zeitz*, 333 U.S. 56 (1948) (Court of Appeals' misapplication of the law regarding contempt for failure to comply with bankruptcy turnover order lead to adjudication of rights without consideration of essential facts in the record below).

B. By avoiding a difficult but important issue, the Court of Appeals has created confusion as to an important federal question.

The proper interpretation of § 507(b), and Senior Judge Haight's instruction to the jury regarding the relief available under that section of the Code, was the central issue in this

case. The meaning of § 507(b) and when relief is available under § 507(b) are important federal questions that potentially could arise in every bankruptcy with a secured creditor. Senior Judge Haight held a secured creditor's claim is not given superpriority status if a bankruptcy court denies a lift stay/adequate protection motion, and the secured creditor's collateral subsequently proves inadequate to cover its claim. (App. 34a-62a, App. 8a). Chief Judge Mukasey held that a secured creditor's claim is given superpriority status if a bankruptcy court denies a lift stay/adequate protection motion, and the secured creditor's collateral subsequently proves inadequate to cover its claim. (App. 7a, App. 94a-104a).

The concept of § 507(b) is to protect secured creditors from losing their Fifth Amendment property rights by confiscation for the benefit of a debtor when a bankruptcy judge permits a debtor, over the secured creditor's objection, to continue to use the secured creditor's collateral and the value of the collateral declines. H. Rep. No. 595, 95th Cong. 2d Sess., 339 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6295; *see also* S. Rep. No. 989, 95th Cong. 2d Sess., 49, 53 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5835, 5839. When a secured creditor moves for relief under Section 362(d)(1) or 363(e), the debtor is afforded the opportunity to make a choice of whether to keep and use the collateral and provide adequate protection or to not use the collateral and thereby avoid having to provide adequate protection. *In re Best Prods. Co., Inc.*, 138 B.R. 155, 158 (Bankr. S.D.N.Y.), *aff'd*, 149 B.R. 346 (S.D.N.Y. 1992). The debtor who chooses to retain and use the secured creditor's collateral over the secured creditor's objection must propose to the secured creditor how the secured creditor is adequately protected against a decline in the value of the collateral. *In re Best Prods. Co., Inc.*, 138 B.R. at 158. *See also Travelers Ins. Co. v. American*

Agcredit Corp. (In re Blehm Land & Cattle Co.), 859 F.2d 137, 140 (10th Cir. 1988) *citing*, *In re B&W Tractor Co., Inc.*, 38 B.R. 613, 617 (Bankr. E.D.N.C. 1984); 3 *Collier on Bankruptcy*, § 361.02 at 361-3 (15th ed. Rev. 1985). Section 507(b) provides that a secured creditor is entitled to a superpriority claim if a debtor "under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor. . . ." and the value of the secured creditor's collateral declined below the amount of the secured creditor's claim. 11 U.S.C.A. § 507(b) (West 1993).

Under §§ 362(d)(1) and 363(e) of the Code, a secured creditor who asks for lift stay/adequate protection relief is afforded an absolute right to the automatic stay being lifted or adequate protection unless the bankruptcy court finds the debtor is providing the secured creditor with adequate protection.[8] Under § 361, the secured creditor's collateral can be adequately protected by something that already exists such as an equity cushion, or by something the debtor offers as additional protection such as payments, additional collateral, insurance, maintenance of the collateral, etc.[9] The

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8. 11 U.S.C.A. § 362(d)(1) (West 1993 & Supp. 2001); 11 U.S.C.A. § 363(e) (West 1993 & Supp. 2001). *See Travelers Ins. Co. v. American Agcredit Corp. (In re Blehm Land & Cattle Co.)*, 859 F.2d 137, 140 (10th Cir. 1988), *citing*, *In re B&W Tractor Co., Inc.*, 38 B.R. 613, 617 (Bankr. E.D.N.C. 1984) ("[S]ecured creditors are entitled to some form of adequate protection in every chapter 11 case."); 3 *Collier on Bankruptcy* ¶ 361.02 at 361-3 (15th ed. rev. 1985).

9. 11 U.S.C.A. § 361 (West 1993). Adequate protection need not take the form of cash payments or replacement liens. Equity cushions have been found to be a method of providing adequate

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bankruptcy court's only role on a lift stay/adequate protection motion is to evaluate whether existing protection already being provided, or new protection being offered, by the debtor is adequate to protect the value of the secured creditor's property interest in the collateral.[10] Only after the bankruptcy

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protection. *See, e.g., City Nat'l Bank v. San Clemente Estates (In re San Clemente Estates)*, 5 B.R. 605, 610 (Bankr. S.D. Cal. 1980); *Pistole v. Mellor (In re Mellor)*, 734 F.2d 1396, 1400 (9th Cir. 1984); *In re Realty Southwest Assocs.*, 140 B.R. 360, 366 (Bankr. S.D.N.Y. 1992); *In re Kids Creek Partners, L.P.*, 236 B.R. 871, 876 (Bankr. N.D. Ill. 1999). Adequate protection can also take the form of maintenance of the collateral, the preservation of records regarding the collateral, insurance, or periodic appraisals. *Sumitomo Trust & Banking Co., Ltd. v. Holly's, Inc. (In re Holly's Inc.)*, 140 B.R. 643, 706 (Bankr. W.D. Mich. 1992); *Fed. Nat'l Mortgage Ass'n v. Dacon Bolingbrook Assocs., Ltd.*, 153 B.R. 204, 214 (N.D. Ill. 1993); *In re Kowalsky*, 235 B.R. 590 (Bankr. E.D. Tax 1999).

10. The role of the bankruptcy court in this process is not to propose the means by which the secured creditor is adequately protected, but rather is limited to deciding whether the means proposed by the debtor provides adequate protection of the secured creditor's interest in its collateral. H. Rep. No. 595, 95th Cong., 2d Sess. 338 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6295; S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5835. *See In re Tudor Motor Lodge Assocs., L.P.*, 102 B.R. 936, 954 & n.4 (Bankr. D.N.J. 1989); *American Sec. Bank, N.A. v. Robson (In re Robson)*, 10 B.R. 362, 365 (Bankr. N.D. Ala. 1981); *City Nat'l Bank v. San Clemente Estates (In re San Clemente Estates)*, 5 B.R. 605, 609 (Bankr. S.D. Cal. 1980); *See also Levin v. Kedzie-Carrol Currency Exch., Inc. (In re Cash Currency Exch., Inc.)*, 52 B.R. 577, 582 (Bankr. N.D. Ill. 1985); *In re Advisory Info. & Mgmt. Sys., Inc.*, 50 B.R. 627, 628 (Bankr. M.D. Tenn. 1985); *Korenman v. Barr (In re Richards Pontiac, Inc.)*, 6 B.R. 773, 777 (Bankr. E.D.N.Y. 1980).

court has determined that such protection is adequate can it authorize the debtor to use the secured creditor's collateral. Section 507(b) is the fail safe that protects against mistakes by a bankruptcy judge in assessing the adequacy of protection already provided, or offered, by a debtor.[11]

Under Chief Judge Mukasey's view of the law, if a bankruptcy court denies a lift stay/adequate protection motion, the bankruptcy court necessarily is determining that the existing, or proffered, protection is adequate because, *inter alia*, a bankruptcy court is required by § 362(d)(1) of the Code to lift the automatic stay if the protection is not adequate.[12] In that event, a secured creditor is entitled to a § 507(b) superpriority claim. Senior Judge Haight has held that it is only the granting of an adequate protection motion that would give rise to a § 507(b) superpriority claim. (App. 34a-62a, App. 8a).

This question regarding the proper interpretation of § 507(b) is an important and difficult question of federal law. This legal question is of exceptional importance because it affects both important rights of all secured creditors to protect the value of their collateral in all bankruptcy reorganizations as well as important rights of a debtor to use collateral in aid of its reorganization. Nevertheless, no case,

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11. *In re Carpet Ctr. Leasing Co., Inc.*, 4 F.3d 940, 941 (11th Cir. 1993), *cert. denied, sub nom*, 510 U.S. 1118 (1994); *Citibank, N.A. v. Transamerica Commercial Fin. Corp. (In re Sun Runner Marine, Inc.)*, 134 B.R. 4, 7 (9th Cir. 1991); *First Nat'l Bank of Boston v. Marine Optical, Inc. (In re Marine Optical, Inc.)*, 10 B.R. 893, 894 (1st Cir. BAP Mass. 1981).

12. ". . . the court shall grant relief from the stay. . . ." 11 U.S.C.A. § 362(d)(1) (West 1993 & Supp. 2001).

except this case at the district court level, has directly addressed the question. (App. 41a-42a).[13] This Court has never had occasion to decide the circumstances under which a superpriority claim arises under § 507(b) of the Code.

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13. In *Ford Motor Credit Co. v. Dobbins*, Civ. Action No. 92-0777-R, slip opinion (W.D. Va. February 11, 1993) the Western District of Virginia awarded a § 507(b) superpriority to a secured creditor even though the bankruptcy court had denied a lift stay motion on the ground that the secured creditor was adequately protected by an equity cushion. *Ford Motor*, Civ. Action No. 92-0777-R, slip op. at 3 and 7. This decision was reversed on other grounds by the Fourth Circuit Court of Appeals but the Fourth Circuit specifically referred to the order denying the lift stay motion on the ground of an equity cushion as an "adequate protection order." *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 865 and 872 n.5 and n.10 (4th Cir. 1994). In *Vincent Properties, Inc. v. Five Star Partners, L.P. (In re Five Star Partners, L.P.)*, 96 Civ. 0832 (CAM) at 8 n.4 (N.D. Ga. Nov. 13, 1996), the Northern District of Georgia affirmed a bankruptcy court decision that stated in *dicta* that the denial of an adequate protection motion on the ground of an existing equity cushion would not be sufficient predicate for a superpriority claim. However, the Northern District of Georgia affirmed the decision on other grounds and noted its dissatisfaction with the bankruptcy court's *dicta* concerning § 507(b), stating "This court questions the validity of the bankruptcy court's conclusion that § 507(b) does not apply when relief from the automatic stay is denied because of the existence of an equity cushion. Section 507(b) might apply if the court makes an express finding that adequate protection is provided through the equity cushion." *Five Star*, 96 Civ. 0832 (CAM), slip. op. at 6-7 n.4 (affirming 193 B.R. 603 (Bankr. N.D. Ga. 1996) on the ground that the creditor obtained neither a court ruling that adequate protection existed nor a court ruling that the debtor had to provide additional adequate protection).

C. The exercise of this Court's supervisory power is necessary.

The decision of the Court of Appeals in this case warrants the exercise of this Court's supervisory authority. Where a Court of Appeals declines to hear the merits of an appeal on a ground that is clearly refuted by the record below that decision reflects poorly on the entire judiciary, impinges the appellate jurisdiction established under the Constitution and enacted by Congress, and infringes on the responsibility and province of the jury. The Court's supervisory authority is needed to ensure that Courts of Appeals apply a reasoned analysis before declining to hear the merits of an appeal from a jury's verdict on the ground the issue being appealed is not relevant to the issue identified by the jury as the basis for its verdict. This Court should grant certiorari to vacate a judgment based on an instruction regarding the law that was challenged on appeal but not decided by the Panel majority, an instruction that was clearly improper in light of the Court of Appeals' ruling.

In view of the fact that the Court of Appeals ignored that part of the record below that plainly refutes the reason on which the Court of Appeals based its refusal to decide the merits of Petitioners' appeal, Petitioners respectfully submit that it would be appropriate in this case for this Court to grant summary reversal of the judgment of the Court of Appeals and vacate the judgment of the district court because of the improper jury instruction or to remand the case to the Court of Appeals to decide the correct meaning of § 507(b).

At a minimum, this Court should summarily reverse the Court of Appeals' denial of Petitioners' motion for rehearing or rehearing *en banc* and direct the Court of Appeals to grant rehearing or rehearing *en banc*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari, or summary reversal, should be granted.

Respectfully submitted,

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